76-5081

Supreme Court, U.S.
FILED
OCT 8
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.

CLARENCE J. MATYA, HELEN MATYA, EDWARD ABBOUD, EDWARD L. STANEK, DONALD GENE MORAN, JAMES M. WALKER, GEORGE H. CHONIS, LOUIS J. URZENDOWSKI, a/k/a Lou Sandy, OTTO J. MATULKA and DONALD J. QUINN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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CLARENCE J. MATYA, HELEN MATYA, EDWARD ABBOUD, EDWARD L. STANEK, DONALD GENE MORAN, JAMES M. WALKER, GEORGE H. CHONIS, LOUIS J. URZENDOWSKI, a/k/a Lou Sandy, OTTO J. MATULKA and DONALD J. QUINN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the Order and Decision of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on September 9, 1976.

OPINION BELOW

The Decision and Order of the United States Court of Appeals for the Eighth Circuit was filed on September 9, 1976. The Decision and Order has not yet been reported and is reproduced herein as Appendix "A".

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the contents of all communications intercepted during the "wiretap" in issue should be suppressed based on non-compliance with the "necessity" requirements of Title 18 U.S.C. §2518(1)(c) and Title 18 U.S.C. §2518(3)(c).

2. Whether Congress intended Title 18 U.S.C. §1955 to elevate, for purposes of obtaining federal jurisdiction, a state misdemeanor into a federal felony when the activity complained of was of a purely intrastate character.

STATEMENT OF THE CASE

The Government brought this criminal proceeding by means of a two-count indictment charging in Count I a violation of Title 18 U.S.C. Sections 1955 and 2 ("An

Illegal Gambling Business") against all petitioners and charging in Count II a violation of Title 18 U.S.C. Sections 1952 and 2 ("Interstate Racketeering Enterprises") as to petitioners CLARENCE J. MATYA and JAMES M. WALTER. (R. 1)[1] The respective petitioners entered pleas of Not Guilty to the applicable counts. (R. 34).

After extensive pretrial motions were filed and heard the petitioners were tried by trial by jury, before the Honorable ROBERT V. DENNEY, United States District Judge for the District of Nebraska, the trial commencing September 4, 1974, and concluding September 28, 1974, with the jury returning a verdict of Guilty as to all petitioners on Count I (R. 154) and a verdict of Not Guilty on Count II as to the petitioners CLARENCE J. MATYA and JAMES M. WALKER. (R. 155).

The Court imposed terms of incarceration and costs on all petitioners with the exception of petitioner HELEN J. MATYA, who received a sentence of probation, payment of a fine and assessment of costs. (R. 187-200).

All the petitioners filed motions for new trial (R. 158,159,160,163,201,219) which were denied (R. 165,227,228).

The petitioners requested, and were granted, bond on appeal, having duly filed notices of appeal (R. 185).

The Court of Appeals for the Eighth Circuit affirmed by virtue of Decision and Order of September 9, 1976.

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[1]The Record is designated as (R. . .); and the Reporter's Transcript of the Proceedings is designated as (Tr. . .).

STATEMENT OF THE FACTS

The Petitioners were indicted by a Federal Grand Jury in Omaha, Nebraska, on February 21, 1973. (R. 1)

The evidence resulting in the return of the indictment and conviction at trial was derived from the interception of wire communications on certain telephones.

The interception of the wire communications took place as a result of an application being made to the Honorable WARREN K. URBOM, Judge for the District of Nebraska, for said interception.

On February 4, 1972, in an order designated DN 2, Federal Bureau of Investigation Agents were authorized to intercept for a period of fifteen days the wire communications of Petitioners CLARENCE JOHN MATYA, DONALD EUGENE MORAN, EDWARD ABBOUD, PAUL MURPHY, three other designated persons and "others as yet unknown" to and from two telephones which were situated at a place where CLARENCE J. MATYA had a nexus. The purpose of the interception was to secure evidence relating to offenses in violation of 18 U.S.C. 1955 and 371. The interceptions commenced on February 5, 1972, and terminated on February 12, 1972. (The original District Court Record for reference to Application, Affidavit and Order in DN 2 is in the custody of the Clerk for Court of Appeals for Eighth Circuit.

In the application filed to obtain the wiretap order the applicant, GARY CORNWELL, an attorney of the Organized Crime and Racketeering Section of the Department of Justice, represented that the use of a wiretap was appropriate since "normal investigative procedures reasonably appear unlikely to succeed." In

making this representation CORNWELL relied on the affidavit of Federal Bureau of Investigation Agent JOHN ANDERSON, whose affidavit purportedly showed that standard investigative techniques would be inadequate to secure prosecutable evidence.

CORNWELL'S application indicated that the defendants named therein were engaged in an "illegal gambling business" in violation of 18 U.S.C. 1955. In making this representation CORNWELL relied on the aforementioned ANDERSON affidavit which stated " . . . Nebraska law prohibits the accepting and making of bets on sports events other than the parimutuel betting conducted at legally authorized race tracks pursuant to state law."

Judge URBOM, in issuing his Order of February 4, 1972, adopted in his findings the representations of CORNWELL and ANDERSON. On the basis of the Order, the interceptions took place. Conversations of an evidentiary nature were intercepted, from which allegations were made to obtain search warrants for the Petitioners' persons and premises, as a result of which searches were conducted on February 12, 1972. In addition, the conversations were used in an extensive grand jury inquiry which lasted over several months, resulting in a return of the subject indictment on February 21, 1973.

The Petitioners filed various motions to suppress which encompassed the Government's procedures and representations, or lack thereof, in obtaining the wiretap order, as well as attacking the validity of the procedure which permitted the enhancement of a state misdemeanor to the status of a federal felony, assuming *arguendo* that the state statute was constitutionally well-founded (R. 37). The various motions were denied (R. 110).

The trial was conducted shortly thereafter. The Government relied on primarily four lines of proof: (1) the tapes of the intercepted conversations, (2) testimony of persons concerning their wagering activity with the particular petitioners, (3) physical surveillance of the Petitioners, and (4) the "expert opinion" of a Federal Bureau of Investigation Agent, that a necessary element in a bookmaking business is to have agents who associate themselves with the primary bookmaker in a profit splitting arrangement, thus according to the Government's theory, be considered part of the same illegal business, *e.g.* the crux of the prosecution under 18 U.S.C. 1955.

REASONS FOR GRANTING THE WRIT

I.

THE CONTENTS OF ALL COMMUNICATIONS INTERCEPTED DURING THE "MATYA TAP" SHOULD HAVE BEEN SUPPRESSED BASED ON NON-COMPLIANCE WITH THE "NECESSITY" REQUIREMENTS OF TITLE 18 U.S.C. §2518(1)(c) AND TITLE 18 U.S.C. §2518(3)(c).

DEFINITION OF "NECESSITY"

Title III[2] was enacted to remedy what was considered an intolerable state of the law in the area of electronic surveillance. Title III specifically set out to

[2] Reference to Title III means generally Title 18 U.S.C. §2510 *et seq.*

accomplish the dual purpose of protecting the privacy of wire and oral communications and of delineating on a national basis the circumstances and conditions under which the interception of wire and oral communications may be authorized. *Senate Report No. 1097, 90th Congress, Second Session 66 (1968).*

One key limiting provision of Title III, intended to prevent unwarranted invasions of personal privacy, mandates that the application for an interception order contain:

> [A] full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be dangerous. 18 U.S.C. 2518(1)(c) (1968).

A United States District Court judge or United States Court of Appeals judge may authorize an order permitting electronic surveillance only if it is found that:

> [N]ormal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous. 18 U.S.C. 2518(3)(c) (1968).

These two related requirements, which will be referred to as the "necessity requirements" are not further mentioned elsewhere within Title III, nor does Title III provide guidelines for the interpretation of the requirement, how it is to be implemented, or what consideration or criteria should be evaluated in the making of the judicial determination of necessity. Title III only requires that the application for the interception order contain a "full and complete statement" about the need for the use of electronic surveillance.

Title III does not require the judge approving an application to include in his order the reasons for, the

criteria of, or the information evaluated in determining whether or not the necessity requirements has been met. In fact the judge need not even include a simple finding of necessity in the authorization. *United States v. Mainello*, 345 F. Supp. 863, 974 (E.D.N.Y. 1972); *United States v. Tortorello*, 345 F. Supp. 1029, 1036 (S.D.N.Y. 1972); aff'd 480 F.2d 764 (2nd Cir.), Cert. denied 414 U.S. 866 (1973); *United States v. Robinson*, 472 F.2d 973 (5th Cir., 1973) (Per curiam). But see *United States v. Curri*, 363 F. Supp. 430, 435 (D. Md., 1973). This interpretation results from the fact that 18 U.S.C. 2518(4), specifying what must be contained in the interception order, fails to make any reference to the necessity requirement.

THE "NECESSITY REQUIREMENT" IS FOUNDED UPON FOURTH AMENDMENT PRINCIPLES

Authorized warrants for search and seizure of a person's property are subject to the Fourth Amendment restriction against "unreasonable searches and seizures". As stated in *Katz v. United States*, 389 U.S. 347, 355 (1967): "[A] conventional warrant ordinarily serves to notify the suspect of an intended search." That statement recognizes the settled principle that "notice" to the individual against whom the warrant is served is required under the terms of the Fourth Amendment. Since conventional search warrants are aimed at the seizure of tangible property, the "notice" requirement is complied with by serving a copy of the warrant upon the individual who is the subject of the search at the time of its execution. Proper compliance with the "notice" principle has presented few problems to law

enforcement personnel in their efforts to seize tangible evidence.

The rapid advancement of scientific technology resulted in the ability to seize additional intangible forms of evidence, i.e., oral communications between two parties. With the advent of this investigative tool the Courts were presented with new issues concerning the balancing of Fourth Amendment requirements with legitimate law enforcement efforts, particularly with regard to the Fourth Amendment principle of "notice". The Supreme Court faced this question prior to the passage of Title III in *Berger v. New York*, 388 U.S. 41 (1967).

The issue before the Berger Court was the constitutionality of the State of New York's permissive electronic surveillance statute. The Court concluded, based on several principles, that the statute was unconstitutional, relying on the Fourth and Fourteenth Amendments. One of the grounds upon which the Court based its decision was the failure of the statute *to require a showing of exigent circumstances to justify the failure to give the subject of the interception notice prior to the execution of the warrant. Berger* at 288 U.S. 60. The Court emphasized this "exigent circumstances" requirement by stating:

> [T]he statute's procedure, necessarily because its success depends on secrecy, has no requirement for notice as do conventional warrants, nor does it overcome this defect by requiring some showing of special fact. On the contrary, it permits unconsented entry without any showing of exigent circumstances. Such a showing of exigency, in order to avoid notice, would appear more important in eavesdropping, with its inherent dangers, than that required when conventional procedures of search and seizure are utilized. *Berger* at 388 U.S. 60.

"EXIGENT CIRCUMSTANCES" Vs. "NECESSITY"

In *Berger* none of the opinions of the justices describes or explains what is meant by the terms "exigent circumstances" or "special fact." One thing is certain though - the showing of exigent circumstances to excuse the lack of presearch notice is a *Constitutional requirement*, for the *Berger* holding is based on the Fourth and Fourteenth Amendments.

By the mere nature of its operation, electronic surveillance has been viewed as a more serious invasion of privacy than other types of investigative procedures. *Alderman v. United States*, 394 U.S. 165, 202 (1969) (Fortis J., concurring in part and dissenting in part); *Berger v. New York*, 388 U.S. 41, 56, 63 (1967); *Osburn v. United States*, 385 U.S. 323, 352-354 (1966) (Douglas, J., dissenting); *Lopez v. United States*, 373 U.S. 427, 441 (1963) (Warren, C.J., concurring in the result). This fact resulted in the *Berger* requirement of a showing of "exigent circumstances." It also resulted in the Court's stating in *Katz v. United States*, 389 U.S. 347, 355 (1967), that "no greater invasion of privacy was permitted than that *necessary* under the circumstances." (Emphasis Supplied)

In view of the fact that the "exigent circumstances" requirement of *Berger* is founded on Constitutional principles, the Appellants in the present case strongly argue that the "necessity" requirement of 18 U.S.C. 2518 have an equal Constitutional basis, i.e., that the Constitutional requirement of *Berger* was codified in Title III. In support of this argument Appellants cite two separate authorities.

The first recognition of the fact that the "exigent circumstances" requirement is synonymous with the "necessity" provisions of Title III came during the floor

debate on the Title III legislation. Senator TYDINGS, speaking to this point, stated:

> "Mr. Justice Clark (in *Berger v. New York*) recognized what is the distinct difference between a conventional warrant and the electronic surveillance warrant: the electronic surveillance warrant depends for its success on the absence of notice. Yet Mr. Justice Clark observed the New York statute required no showing of 'special facts' or 'exigent circumstances' to overcome the normal requirement of pre-search notice. Here Mr. Justice Clark was referring to the analogous situation sustained by the Court in *Kerr* (sic) *v. California*, 374 U.S. 23 (1963), a case in which he offered the majority opinion. . . Such a showing of 'special facts' or 'exigent circumstances' would unquestionably be met by a legislative requirement that judicial authorization for the use of electronic surveillance techniques be conditioned on a showing, for example, that 'normal investigative procedures have been tried and have failed or reasonably appear unlikely to succeed if tried.' This is the English standard now for the use of wiretapping on the Home Secretary's warrant." 114 *Congressional Record* 12987 (1968)

The academic sector was next to acknowledge the equality of the two provisions. Professor G. ROBERT BLAKELY, who, as preparer of the Bill that eventually evolved into Title III and as the reporter for the *ABA Project on Minimum Standards for Criminal Justice - Standards Relating to Electronic Surveillance* (Approved Draft) (hereinafter cited as *ABA Standards Relating to Electronic Surveillance*) is regarded as probably the foremost academic spokesman for the legitimation of electronic surveillance. In 1967 Professor BLAKELY co-authored a Law Review article proposing an electronic surveillance control act. [*Blakely and*

Hancock, A Proposed Electronic Surveillance Act, 43 Notre Dame Law 657 (1967-68)]. In the proposed statute, he included the necessity requirement in essentially the same wording as it appears in Title III. *Id.* at 673. The comment accompanying the inclusion of the necessity requirement clearly equates the requirement with the *Berger* Constitutional requirement of a showing of exigent circumstances. *Id.* at 673, n. 35.

The above sources each stand for the proposition that the *Berger* test of "exigent circumstances" with its Constitutional basis has been codified in Title III under the "necessity" requirements of 18 U.S.C. 2518(1)(c) and 18 U.S.C. 2518(3)(c). Therefore, the necessity requirement itself, as a codification of the *Berger* requirement of exigent circumstances, is a *Constitutional requirement* and, as such, is to be strictly followed so as to protect the guaranteed rights of United States citizens.

All of the justices on the Supreme Court have recognized the strictness with which Title III must be implemented. In *United States v. Chavez*, 416 U.S. 562 (1974), the majority said that "strict adherence by the Government to the provisions of Title III would. . . . be. . .in keeping with the responsibilities Congress has imposed. . . ." *Id.* at 580. Justice DOUGLAS, in dissent, joined by Justices BRENNAN, STEWART and MARSHALL, stated that "the history of Title III reflects a desire that its provisions be strictly construed." *Id.* at 597. This same proposition has been accepted in *Gelbard v. United States*, 408 U.S. 41, 46-47 (1972); *United States v. Giordano*, 416 U.S. 505 (1974); *United States v. United States District Court*, 407 U.S. 297 (1972). The Fifth Circuit recognized the same principles in *United States v.*

Robinson, 472 F.2d 973 (5th Cir., 1973) along with two Florida District Courts in *United States v. Lanza*, 341 F. Supp. 504, 421 (M.D. Fla. 1972) and *United States v. Escandar*, 319 F. Supp. 295, 298 (S.D. Fla. 1970). These Courts have found that strict construction is required from an examination of the Congressional intent behind Title III and the need to protect adequately interests of personal privacy against the inherent dangers involved in the use of electronic surveillance.

THE APPLICATION AFFIDAVIT

The critical component of any interception application is the affidavit in support of the application. The affidavit is usually incorporated by reference into the application, with the application containing only a brief conclusionary statement concerning the necessity of using electronic surveillance.

In the instant case, the affidavit of Agent ANDERSON accompanied the application for the "Matya tap" order issued on February 4, 1972, by Judge URBOM.

The application and the affidavit, taken together, must provide a "full and complete statement" as to the necessity of resorting to the use of electronic surveillance. *United States v. Carubia*, 377 F. Supp. 1099, 1108 (E.D.N.Y. 1974); *United States v. Falcone*, 364 F. Supp. 877 (D.N.Y. 1973); *United States v. Mainello*, 345 F. Supp. 863 (E.D.N.Y. 1972). Affidavits have been determined to be insufficient in making the required necessity showing when they provide only cursory and conclusionary averments of inadequacy or difficulty of using normal investigative techniques. It is submitted that this Court has reviewed such averments

made in boiler-plate fashion in most, if not all, the Title III applications before the Court.

Paragraph 5 of Agent SULLIVAN'S affidavit states:

"5. My experience and the experience of other agents has shown that even though gambling customers are identified, they are unwilling to furnish information to law enforcement agents or officials inquiring into gambling activities. This is even more true when the customer is a professional gambler himself and is requested to give information concerning the gambling operations. Standard investigative techniques which have been utilized by your affiant and other agents of the Omaha Office of the Federal Bureau of Investigation over the past six months have not succeeded in providing evidence to sustain prosecution in this case, and affiant does in good faith believe that such techniques would succeed only to a limited degree in establishing the scope and nature of the illegal gambling operations believed to be engaged in by CLARENCE JOHN MATYA, DONALD EUGENE MORAN, EDWARD ABBOUD, DENNIS MUNNELLY, JOHN SKRADIS, PAUL MURPHY, LOU LUKAS and the other individuals not fully identified at this time, if solely relied upon in the future. Furthermore, such investigative techniques as physical surveillance and examination of the records obtainable on these individuals offer little probability of success in securing presentable evidence. My belief as to the inadequacy of normal investigative procedures as applied to this case is based upon the fact of the secretive and guarded manner in which this gambling conspiracy is being conducted, and my evaluation of those circumstances in the light of my experience as a Special Agent of the Federal Bureau of Investigation in the investigation of gambling cases and my association with other Special Agents who have conducted other gambling investigations. My

training and the experience of other agents has shown that gambling raids and searches of gamblers and their gambling establishments, in the past, have frequently not resulted in the gathering of sufficient physical or other evidence to prove all elements of the offense and have only resulted in allowing the bookmakers and their associates to change their places and methods of operation and to destroy their records and thus to thwart further investigation. Additionally, records that have been seized in past gambling cases have generally not been sufficient to establish the elements of Federal offenses, because such records are difficult to interpret and many times are of little or no significance without further evidence of the gambler's activities. Therefore, the interception of these telephone communications is the only available method of investigation which has a reasonable likelihood of securing the evidence necessary to prove violation of these statutes. All of the confidential informants mentioned in this affidavit have indicated that they are unwilling to testify against CLARENCE JOHN MATYA, DONALD EUGENE MORAN, EDWARD ABBOUD, DENNIS MUNNELLY, JOHN SKRADIS, PAUL MURPHY, LOU LUKAS and the other individuals not fully identified at this time, because they fear for the personal safety of both themselves and their families."

At least two Courts have recognized that "boiler-plate" allegations are frequently placed in supporting affidavits, particularly with respect to the statements concerning the use of "other investigative techniques". In *United States v. Kahn*, 471 F.2d 191 (7th Cir., 1972), rev'd on other grounds, 415 U.S. 143 (1974), the Court of Appeals stated as follows:

"The conclusionary statement in the application and affidavit that 'normal investigative methods reasonably appear unlikely to succeed and are too

dangerous to be used' is too slender a reed upon which to rest the invasion of [the defendant's] privacy." *Kahn* at 197.

In *United States v. Kerrigan*, 514 F.2d 35 (9th. Cir., 1975), the Court, recognizing the fact that law enforcement agencies use boiler-plate allegations to meet the necessity requirement, expressed criticism of this practice and found the showing sufficient only because of the strong factual context of the case. After summarizing the allegations of the affidavit, the Court stated:

> "We agree with Appellants that the boiler-plate recitation of the difficulties of gathering usable evidence in bookmaking prosecutions is not a sufficient basis for granting a wiretap order. To hold otherwise would make Section 2518(1)(c) and (3)(c) [of Title 18] mere formalities in bookmaking cases. However, in this case, agents had engaged in investigation for over three months, including physical surveillance of the suspects, had reasonably established that their informants would not testify, and had reason to believe that the other evidence thus far produced would not support a conviction." *United States v. Kerrigan, supra.*

As will be shown to the Court, the factual context of the present case is in no conceivable way similar to that upon which the *Kerrigan* Court upheld the conclusionary allegations contained in that affidavit.

The danger that boiler-plate terms would be developed to meet the necessity showing was recognized in the Senate Floor Debate on Title III:

> "[Title III] further requires a showing that 'normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." We agree with the thought that underlying this requirement, i.e., that wiretapping and eavesdropping should not be used unless absolutely necessary. [Title III] *should not, however, leave open the possibility of satisfying this requirement by a boiler-plate recital of the statutory language.* It should provide for a description with particulars of the efforts that have been made to obtain evidence without wiretapping or eavesdropping and a reasoned justification of the need for using wiretapping and eavesdropping methods." 114 *Congressional Record* 14474 (1968) (remarks of Senator LONG) (Emphasis Added)

Obviously, there is not shown in the affidavit a "full and complete statement" as to:

A. Why physical surveillance reasonably appears unlikely to succeed.

B. Why contacts with other law enforcement agencies reasonably appear unlikely to succeed.

C. Why the use of informants and/or immunized witnesses reasonably appear unlikely to succeed.

D. Why immunity was not offered to the informants.

What are other "investigative procedures?"

In determining the exact meaning of "other investigative procedures" the best source available would appear to be the *Senate Report* relative to Title III legislation. In that *Report* the following statement appears:

> "Normal investigative procedure would include, for example, standard visual or aural surveillance techniques by law enforcement officers, general questioning or interrogation under an immunity grant, use of regular search warrants, and the infiltration of conspiratorial groups by undercover agents or informants." Senate Report No. 1097, 90th Congress, Second Session (1968) at 101.

The affidavit is absent any attempt on the part of the Federal Bureau of Investigation to exhaust all reasonable avenues of surveillance of CLARENCE JOHN MATYA himself, or the other named individuals, which is evidence of the total disregard for the Constitutional foundation upon which the "necessity" requirement rests.

QUESTIONING OR INTERROGATION UNDER IMMUNITY GRANT

The second form of other investigative procedures alluded to in the *Senate Report, supra,* was the questioning or interrogation of potential witnesses under a grant of immunity. Such a procedure is provided for in Title 18 U.S.C. §§6002 and 6003.

The immunity grant would appear to be a valuable tool to law enforcement in the investigation of gambling operations. Through the use of other investigative techniques, such as visual surveillance, investigators would be able to determine who many of the customers and employees of the bookmaker are. General interrogation of these potential witnesses would be the next investigative step. It is natural to assume that a certain percentage of these potential witnesses would be hesitant to make statements which could be used in a Grand Jury proceeding; the customer because he wishes to continue betting and the employee for fear of losing his job. However, once the investigatory agency makes application to the United States Attorney's Office for a grant of immunity and that grant is approved by the Court, it is also natural to assume that these witnesses, when faced with the contempt provisions of the statute will choose to testify rather than to go to jail for eighteen months.

The Court is also asked to recognize the fact that Agent ANDERSON, and others within the Federal Bureau of Investigation, through their failure to use visual surveillance abandoned the opportunity to gain the identity of potential witnesses and, in turn, the opportunity to compel the testimony of these witnesses under the provisions of the immunity statute.

At no time prior to the installation of any one of the three "taps" which Agent ANDERSON has been involved in since 1972 did he *attempt* to use the provisions of the immunity statute for purposes of proving the violation under investigation. Nor did he explain to Judge URBOM why the use of this technique reasonably appeared to be unlikely to succeed.

Once again there appears the establishment of failure to use an effective investigative tool, i.e., the subpoenaeing of witnesses before a Grand Jury *prior* to resorting to the use of the most intrusive form of invasion of privacy, the interception of oral communications.

Failure to use or attempt to use this statutory provision, Title 18 U.S.C. §§6002 and 6003, is but another example of the continuing erosion of the Constitutional principles of the "necessity" requirements.

USE OF REGULAR SEARCH WARRANTS

Conventional search warrants have long been used by law enforcement officers in obtaining tangible evidence upon which to base a conviction. As long as the requisite probable cause is shown for issuance of the warrant and the specific place to be searched and items to be seized appear in the application, Courts have

upheld their function in the investigation of criminal activity. The use of visual surveillance and execution of conventional search warrants are, in all probability, the two most useful techniques available to criminal investigatory agencies.

The search of February 12, 1972, which took place little more than one week after the wiretap was initiated, resulted in the seizure of:

(a) Bookmaker's records.
(b) Gambling paraphernalia.
(c) The identify of betting customers.
(d) Betting "slips" totalling *substantially* more than $2,000.00.

The argument that the use of "other investigative" procedures in the investigation of gambling operations will prove too difficult, thereby opening the door for the interception of oral communications, bears no weight with regard to the "necessity" requirement, particularly in light of the fact that there has been an established pattern of giving only token recognition to these "other" procedures. As in the case of visual surveillance and the use of the immunity statute, the execution of conventional search warrants by Agent ANDERSON has been an event occurring only "after the fact," i.e., after installation of the wiretap. This procedure shows a total disregard for the requirements of the "necessity" provision and provides further evidence of the erosion of the principles upon which that provision is based.

FULL AND COMPLETE STATEMENT

In drafting the Title III Legislation, Congress determined that, in applications for oral intercept orders, a "full and complete statement" should be made as to the use of other investigative procedures prior to the application. Title 18 U.S.C. §2518(1)(c). Defendants have shown to the Court in argument, *supra* that Paragraph 5 of Agent ANDERSON's affidavit makes only conclusionary statements as to what normal investigative procedures were used by him prior to the application of February 4, 1972 for the "Matya tap" oral intercept order.

What is believed to be possibly the most recent detailed review of an affidavit for wiretap application with emphasis on the provisions of Title 18 U.S.C. §2518(1)(c) is found in the Ninth Circuit decision in *United States v. Kalustian*, ___ F.2d ___, (No. 74-3314) (9th Cir., August 4, 1975).

In its opinion, the Court set out at length many of the supporting affidavit representations upon which the Federal Bureau of Investigation based its request for the oral intercept order. Several of these representations should here be noted:

(a) "Standard investigative techniques have not succeeded in providing evidence to sustain prosecution in this case and would only succeed to a limited degree in establishing that . . . and others as yet unknown, are involved in gambling activities over the telephone subscribed to in the name of. . ."

(b) "Furthermore, such investigative techniques as physical surveillance and the records obtained on . . . and others as yet unknown, contain little probability of success in securing presentable evidence. Based upon my knowledge

and experience as a special agent of the Federal Bureau of Investigation in the investigation of gambling cases and my association with other special agents who have conducted investigation of gambling activities, normal investigative procedures appear to be unlikely to succeed in establishing that the above individuals are involved in gambling activities over the aforementioned telephones in violation of Federal laws."

(c) "My experience and the experience of other agents has shown that gambling raids and searches of gamblers and gambling establishments have not, in the past, resulted in the gathering of physical or other evidence to prove all elements of the offense."

(d) "I have found through my experience and the experience of other special agents, who have worked on gambling cases, that gamblers frequently do not keep permanent records. If such records have been maintained, gamblers, immediately prior to or during a physical search, sometimes destroy the records."

In its opinion, the Court did not discuss the particular facts involved in the case nor did it closely scrutinize the investigative techniques used by the Government prior to its application for the intercept order. The Court did state:

> "The act [Title III] has been declared Constitutional only because of its precise requirements and its provisions for close judicial scrutiny. *United States v. Bobo*, 477 F.2d 974 (4th Cir., 1973); *United States v. Cox*, 449 F.2d 679 (10th Cir., 1971), *cert. denied* 406 U.S. 934 (1972); *United States v. Cox*, 462 F.2d 1293 (8th Cir., 1972)."

In reversing the trial court's order denying the Defendants' motions for suppression of the electronic surveillance evidence, the Court stated:

> "The Government failed in this case to satisfy 18 U.S.C. 2518(1)(c). Its application did not adequately show why traditional investigative techniques were not sufficient in this particular case. A reviewing judge is handicapped without a full and complete statement of underlying circumstances. The Government must (1) inform him of every technique which is customarily used in police work in investigating the type of crime involved, and (2) explain why each of them has either been unsuccessful or is too dangerous or unlikely to succeed because of the particular circumstances of the case. Title III and the individual's right to privacy which it seeks to preserve demands no less."

The inescapable conclusion to be drawn from the quoted affidavit language from *Kalustian* as compared with the representations made in Agent ANDERSON's January 4, 1972 "Matya tap" affidavit is that the language in both is so very similar in nature as to almost be considered the same. Both contain "bald conclusions" rather than facts upon which a detached judge could determine whether "normal investigative procedures" were viable alternatives to electronic surveillance, as he is required to do under 18 U.S.C. 2518(3)(c). The *Kalustian* Court stated that:

> "The affidavit does not enlighten us as to why this gambling case presented any investigative problems which were distinguishable in nature or degree from any other gambling case."

Defendants here state to this Court that the January 4, 1972 "Matya tap" affidavit of Agent ANDERSON makes no showing of distinguishable characteristics between this and other gambling cases. The *Kalustian* Court rightfully recognized the purpose of the statute and the reasons for its strict construction and

concluded that a "full and complete" statement relative to the "necessity" requirements had not been made, and therefore, suppression of the evidence was required, as it should be herein.

II.

CONGRESS DID NOT INTEND TITLE 18 U.S.C. §1955 TO ELEVATE, FOR PURPOSES OF OBTAINING FEDERAL JURISDICTION, A STATE MISDEMEANOR INTO A FEDERAL FELONY WHEN THE ACTIVITY COMPLAINED OF WAS OF A PURELY INTRASTATE CHARACTER.

It is interesting to note, by the Jury's verdict, in acquitting CLARENCE J. MATYA and JAMES M. WALKER of the interstate charge in Count II of the indictment, implicitly found the "gambling operation" to be one of a purely intrastate nature. It is also important to note that the Nebraska "gambling" statute is a misdemeanor which is punishable by imprisonment "in the county jail not less than one nor more than six months, and be fined in any sum not exceeding five hundred dollars." Nevertheless, the prosecution is based on a Federal statute which is contingent on the violation of the "laws of a State or political subdivision" thereof, and is punishable as a felony with a term of incarceration up to five years and/or fine of $20,000.

Title 18 U.S.C. §1955 operates so unequally as to violate the due process clause in that it not only applies solely to gambling activities which violate the law of the state in which they occur, and since all states do not have the same law, treatment and selectivity of enforcement is constitutionally unsound, but also to

gambling activities which violate the law of a political subdivision of a particular state (i.e., Misdemeanor, offense, regulation). As a result, gambling activity conducted in one state may be a federal offense, while the same activity in another state may not be a federal offense (as well as a differentiation in the same state from political subdivision to political subdivision). Even within a state, some forms of gambling may be federal offenses while other forms of gambling may not be. *United States v. Derby Race Book and Rose Bowl Sports Book*, ___ F.2d ___ (9th Cir. 1972).

18 U.S.C. §1955 is defective because it does not require proof of a specific effect on interstate or foreign commerce flowing from the prohibited gambling venture.

Historically, the interstate or foreign commerce element had been a prerequisite of enabling federal intervention into gambling activities in violation of the laws of a state. (Cf. 18 U.S.C. 1082 making it "... unlawful ... to set up ... gambling ship ... if such ship is on the high seas ... and is not within the jurisdiction of any State"; 18 U.S.C. 1083 making it "... unlawful [to transport] ... between a point ... within United States and a gambling ship which is not within jurisdiction of any State"; 18 U.S.C. 1084 making it unlawful to "... use a wire facility [to transmit bets and wagers on sporting events] ... in interstate or foreign commerce ..."; 18 U.S.C. 1952 making it unlawful to travel "... in interstate or foreign commerce or use[s] any facility in interstate ... to carry on ... any unlawful activity ..."; 18 U.S.C. 1953 making it unlawful to send "... in interstate or foreign commerce [gambling paraphernalia].")

The apparent conflict with statutory precedent flows from the fact that the subject statute, 18 U.S.C. 1955, was modeled after 18 U.S.C. 1511, which was enacted at the same time, as part of Title VIII – Syndicated Gambling – of the "Organized Crime Control Act of 1970." 18 U.S.C. 1511 was directed to the problem of corruption concerning gambling at the state and local levels, making it a crime for " . . . two or more persons to conspire to obstruct the enforcement of the criminal laws of a State or political subdivision thereof, with intent to facilitate an illegal gambling business . . ." The legislative history states that Section 1511 is aimed at "penal law-enforcement officers – police, prosecutors, or even judges who are 'bought' by the operator of an 'illegal gambling business.'" 115 Cong. Rec. 10736 (1969); 116 Cong. Rec. 605 (1970). Clearly the legislative intent of Section 1511 was not to preempt the field of gambling regulation:

> "It will, however, be possible for the Federal Government to intervene where local and State Governments have been rendered powerless because of the corruption of the responsible officials. . . .
>
> * * *
>
> . . . Thus bribing a local police officer to prevent enforcement of a State or local law against gambling will violate this statute" (116 Cong. Rec. 603-605 (1970).

The reason for the omission of the interstate or foreign commerce element as aforedescribed in federal anti-gambling statutes was as a result of tacked on bill-drafting, since the provisions of 18 U.S.C. 1955 " . . . parallel the provisions of 1151." Sec. 803, Pub. L. 91-452.

The Supreme Court has spoken to the requirement of the affect on interstate commerce in Federal gambling offenses. In *Rewis v. United States*, 401 U.S. 808 (1971), the Court discussed the consequences of an expansive Travel Act (18 U.S.C. 1952). Congress would recognize that it would alter federal-state relationships, could overextend federal police resources, and might transform relatively minor state offenses into federal felonies as a result of geographic happenstance.

CONCLUSION

There have been some cases in the history of this Court of such "peculiar delicacy," *Marbury v. Madison*, 1 Cranch 137 (1803) that they have placed in the balance the continued existence of the values adhered to by the "authors of our fundamental constitutional concepts," *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). These cases arise at the crossroads of our history as a Nation; at those moments when the pressures and conflicts of the day cause even those who sit in high places to seek to throw off the restraints and limitations which the founders placed upon the exercise of governmental power. It is submitted, of such magnitude is the case at bar.

When one branch of government, no matter how powerful, attempts to invade those rights peculiar unto the people, it is the solemn duty of this Court to repudiate such incursions into the freedoms which made this a government of laws and not men.

It is submitted that the provisions of Title III were not complied with in obtaining the order for wiretap, in the terms of the wiretap order, nor in the execution of the terms of said order. It is further submitted that the provisions of 18 U.S.C. §1955 did not contemplate the

inclusion of the type of activity which was the subject matter of the proofs of the instant matter.

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

It is hereby certified that three true and correct copies of the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit was mailed this 6th day of October, 1976, to the Honorable Robert Bork, Solicitor General, United States Department of Justice, Washington, D.C. 20530.

/s/ John R. Schneider
C.L.B. PUBLISHERS

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 74-1947

United States of America, Appellee,	*	
v.	*	
Clarence J. Matya, Helen Mayta, Edward Abboud, Edward L. Stanek, Donald Gene Moran, James M. Walker, George H. Chonis, Louis J. Urzendowski, A/K/A Lou Sandy, Otto J. Matulka, Donald J. Quinn, Paul F. Murphy and Dale Murphy, Appellants.	* * *

illegal gambling business in violation of 18 U.S.C. §1955.[1] Beginning on September 4, 1974, and continuing through September 28, 1974, twelve[2] of the individuals named in that indictment were jointly tried to a jury, Judge Denney[3] presiding. Each of the twelve

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[1] The statute provides in pertinent part:

§1955. Prohibition of illegal gambling businesses.

(a) Whoever conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section –

(1) "illegal gambling business" means a gambling business which –

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to poolselling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling changes therein.

[2] The convicted defendants are Clarence J. Mayta, Helen Mayta, Edward Abboud, Edward L. Stanek, Donald Gene Moran, James M. Walker, George H. Chonis, Louis J. Urzendowski, Otto J. Matulka, Donald J. Quinn, Paul F. Murphy and Dale Murphy.

Of the three remaining individuals named in the indictment, two were granted a severance for medical reasons and one entered a no contest plea. None of these three are parties to this appeal.

[3] The Honorable Robert V. Denney, United States District Judge for the District of Nebraska.

was convicted and sentenced. Each of the twelve appeals.[4]

The contentions raised are as follows:

I. The contents of the communications intercepted during a certain wiretap should have been suppressed based on noncompliance with the "necessity" requirements of 18 U.S.C. §2518(1)(c) and (3)(c).

II. The failure to mention the purported violation of a particular law of the State of Nebraska caused a fatal defect in the process used to obtain the wiretap order.

III. The Nebraska gambling statute, R.R.S. Neb. §28-947 (1943), is constitutionally vague and overbroad.

IV. Congress did not intend 18 U.S.C. §1955 to elevate, for purposes of obtaining federal jurisdiction, a state misdemeanor into a federal felony when the activity complained of was of a purely intrastate character.

V. The evidence was insufficient to sustain a conviction under the statute since there was not proof beyond a reasonable doubt that at least five of the defendants conducted a single gambling enterprise.

The district court rejected each of these contentions. For the reasons hereinafter set out, we agree with the district court in each instance and affirm the convictions.

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[4] The §1955 offense was charged in Count I of the indictment. A second count charged two of the defendants with violation of 18 U.S.C. §§1952 and 2. Both defendants were found not guilty on Count II.

I.

On February 4, 1972, the Government submitted an application to Judge Urbom[5] seeking authority to intercept wire communications of seven named individuals, four of whom are defendants herein, and others, then unknown, over two certain telephones in Omaha, Nebraska. The application asserted there was probable cause to believe that violations of 18 U.S.C. §§1955 and 371[6] had occurred and were occurring and that the other requisites for the desired court order had been satisfied. Accompanying the application was, *inter alia*, an affidavit by an FBI special agent setting forth the results of investigations to that date and purportedly establishing the factual basis upon which the application was predicated.

In an order dated February 4, 1972, Judge Urbom made certain findings and authorized the wiretaps substantially as requested. Included among his findings was a statement that "normal investigative procedures reasonably appear unlikely to succeed." It is unnecessary for our purposes to specify other particulars of the February 4 order.

Defendants' initial contention challenges the sufficiency of the averments in the affidavit on the ground that they do not include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous," as required by 18 U.S.C. §2518(1)(c). See also 18 U.S.C. §2518(3)(c).

[5]The Honorable Warren K. Urbom, Chief Judge, United States District Court for the District of Nebraska.

[6]18 U.S.C. §371 is the conspiracy statute.

Paragraph 4[7] of the affidavit submitted in this case set forth a history of physical surveillance at various locations in the Omaha area, including the residence at which the target phones were located and a number of local bars from which much of the betting allegedly occurred. It also set forth information supplied by a total of seven confidential informants, all of whom were unwilling to testify for fear of their personal safety. It related the results of an interview with Clarence John Mayta, the central figure in the alleged illegal gambling enterprise. It also revealed the examination of various telephone, motor vehicle and police records. In short, it substantiated in detail a statement in paragraph 5 of the affidavit that standard investigative techniques had been utilized over a six-month period.

Paragraph 5 of the affidavit represented that continued use of standard investigative techniques "would succeed only to a limited degree" in establishing the scope and nature of the illegal gambling operations and the identity of other individuals involved therein. This conclusion was based on the "secretive and guarded manner in which this gambling conspiracy is being conducted" and on the affiant's evaluation of the circumstances "in light of [his] experience . . . in the investigation of gambling cases . . . ." The remainder of paragraph 5 detailed investigative problems commonly encountered in gambling cases, including the likely destruction of records and the difficulty in interpreting records even if seized.

[7]Paragraph 4 consumed some thirteen of the affidavit's nineteen pages.

Elsewhere, the affidavit recited that "[c]onstant access to a telephone is necessary for the successful operation of a bookmaking business." The affidavit as a whole substantiated this allegation as applied to the facts at hand.

Defendants strenuously argue that the recitations in paragraph 5 of the affidavit, concerning what the affiant had learned from past experience in gambling cases, are of a "boilerplate" variety and that in any event the affidavit does not adequately explain why certain investigative techniques, such as immunity grants or conventional searches, would have been unsuccessful.

The first half of the argument overlooks the fact that the allegedly "boilerplate" allegations of paragraph 5 are not the only pertinent allegations in the affidavit. As noted above, the affidavit revealed six months of prior investigative activity in this case, all of which had failed to reveal the scope of operations or the identity of individuals involved. *United States v. Kalustian*, 529 F.2d 585 (9th Cir. 1975), relied upon by defendants, is thus inapposite. As we noted in *United States v. Daly*, 535 F.2d 434, 439 n.4 (8th Cir. 1976):

> In *Kalustian*, alternative means of investigation were discarded because "knowledge and experience" in investigating other gambling cases convinced government agents that normal techniques were unlikely to succeed . . . . *But see United States v. Steinberg*, 525 F.2d 1126, 1130 (2d Cir. 1975), [*cert. denied*, 44 U.S.L.W. 3659 (May 19, 1976)]. The court in *Kalustian* ordered the evidence suppressed because the alternative means were given little opportunity to succeed. As discussed above, government agents used alternative means in this case. Inspector Olk's affidavits explain why those investigative techniques were inadequate.

Government agents also used alternative means in this case, and, as explained below, the affidavit adequately set forth why they were inadequate. Thus, whatever our view of the *Kalustian* holding may be, and we need not address that question here, the simple fact is that "[c]ourts have upheld authorizations based on applications that combine statements about general investigative experience in the type of crime and the particular facts of the case at hand." *United States v. Vento*, 533 F.2d 838, 850 n.19 (3d Cir. 1976). And, despite defendants' statement to the contrary, even the Ninth Circuit which authored *Kalustian*, apparently shares this view. *See United States v. Kerrigan*, 514 F.2d 35, 38 (9th Cir. 1975). Accordingly, the mere fact that the affidavit before us rested *in part* on statements that would be equally applicable to almost any gambling case does not render the affidavit insufficient.

The second half of defendants' argument, that certain specific investigative techniques were neither employed nor explained to be inadequate, cannot be squared with the established law of this circuit. As we stated in *United States v. Daly*, *supra* at 438:

> We recognize that Congress intended these sections to restrict wiretaps to those which are necessary as well as reasonable. But Congress did not require the exhaustion of "specific" or "all possible" investigative techniques before wiretap orders could be issued. *United States v. Smith*, 519 F.2d 516, 518 (9th Cir. 1975). Congress prohibited wiretapping only when normal investigative techniques are *likely* to succeed *and* are not too dangerous. "Merely because a normal investigative technique is theoretically possible it does not follow that it is likely." S.Rep. 90-1097, U.S. Code Cong. and Admin. News, pp. 2112, 2190 (1968). Sections 2518(1)(c) and 2518(3)(c) are

> only designed to ensure that wiretapping is "not to be routinely employed as the initial step in criminal investigation," *United States v. Giordano*, 416 U.S. 505, 515 (1974), and " * * * to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." *United States v. Kahn*, 415 U.S. 143, 153 n.12 (1974). The government's showing must, of course, be tested in a "practical and commonsense fashion." *United States v. Kirk*, 534 F.2d 1262, at 1274 (8th Cir. 1976); *United States v. Brick*, 502 F.2d 219, 224 n.14 (8th Cir. 1974), *quoting*, S.Rep. 90-1097, *supra*, at 2190. And as in other suppression matters, considerable discretion rests with the judge to whom the wiretap application is made. *United States v. Smith, supra*, 519 F.2d at 518.

Judged by these standards, the affidavit before us was sufficient. It differs only in minor respects from the affidavits approved in *United States v. Brick, supra* at 224, and *United States v. Schaefer*, 510 F.2d 1307, 1310 (8th Cir.) *cert. denied*, 421 U.S. 975, 978 (1975). It convinces us that the wiretap here was not "routinely employed as the initial step in the investigation." It explains that other techniques were used first, that these other techniques failed to yield specified pertinent facts, and it relates to a reasonable extent why the other procedures would not yield those facts. It was not necessary that the Government explain away *all* possible alternative techniques, since the Government is not required to use a wiretap only as a last resort. *United States v. Smith, supra* at 518, *United States v. Kerrigan, supra* at 38.

We hold that the affidavit in this case complied with 18 U.S.C. §2518(1)(c) and (3)(c).[8]

II.

Eighteen U.S.C. §2518(1)(b)(i) requires that a wiretap application set forth "details as to the particular offense that has been, is being, or is about to be committed." Eighteen U.S.C. §1955, the illegal gambling business statute upon which the wiretap application (as well as the prosecution) in this case was based, defines illegal gambling business as a gambling business which, *inter alia*, "is a violation of the law of a State or political subdivision in which it is conducted." The wiretap application in this case asserted there was probable cause to believe that violations of §1955 had occurred and were occurring. The affidavit which accompanied the application set out underlying facts to justify this conclusion and recited that "Nebraska law prohibits the accepting and making of bets on sports events other than the parimutuel betting conducted at legally authorized race tracks pursuant to state law." It did not specify *which* Nebraska law prohibited such bets. Defendants contend that 18 U.S.C. §2518(1)(b)(i) required it to do so.[9]

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[8] In *United States v. Steinberg, supra*, 525 F.2d at 1130, the Second Circuit stated that "wiretapping is particularly appropriate when the telephone is routinely relied on to conduct the criminal enterprise under investigation." The facts recited in the affidavit before us were sufficient to invoke this principle, which supports the result we reach.

[9] The subsequent indictment did cite R.R.S. Neb. §28-947 (1943). Under *United States v. Cartano*, 534 F.2d 788, 791 (8th Cir. 1976), this may have been unnecessary. Of course, *Cartano* is not dispositive here because the functions of an indictment and a wiretap application are different.

The Fourth Amendment requires in part that "no Warrant shall issue, but upon probable cause, supported by Oath or affirmation." It is this basic requirement which Congress wrote into 18 U.S.C. §2518. *United States v. Kahn*, 415 U.S. 143, 158 (1974) (Douglas, J., dissenting). At least since *Nathanson v. United States*, 290 U.S. 41 (1933), it has been clear that the purpose of the affidavit which accompanies a request for a search warrant is to advise the authorizing judge or magistrate of the "facts and circumstances" establishing probable cause. While the law in this area has been much refined over the years, the central focus on the facts recited in the affidavit has remained unaltered. *United States v. Harris*, 403 U.S. 573 (1971); *Spinelli v. United States*, 393 U.S. 410 (1969); *United States v. Ventresca*, 380 U.S. 102 (1965); *Aguilar v. Texas*, 378 U.S. 108 (1964).

In a §1955 context, knowledge of the state law purportedly violated is essential to the judge's or magistrate's task of determining whether the facts recited in the affidavit establish probable cause. However, citation of the statute in the affidavit is unnecessary to providing the judge or magistrate with that knowledge. We have no doubt that Judge Urbom either was familiar with the Nebraska gambling statutes or had ready access to such statutes and satisfied himself as to the Nebraska law before issuing the challenged order. Nor would the failure of the affidavit to specify which Nebraska law was purportedly violated in any way hamper this court in assessing whether Judge Urbom's probable cause determination was correct, if that determination were challenged. Defendants do not allege that Judge Urbom misconstrued or misapplied the Nebraska statute or that they have

suffered any prejudice as a result of the failure of the affidavit to cite the statute. Consequently, neither the Fourth Amendment nor §2518 support defendants' position.[10] We hold that the affidavit was not defective merely because it failed to cite the Nebraska statute. *See United States v. Averell*, 296 F. Supp. 1004, 1014 (E.D.N.Y. 1969).

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[10]Our textual analysis establishes that there is no substantive reason why the affidavit should be found defective. We also discover no procedural or evidentiary reason why it should be found defective.

The Federal Rules of Civil and Criminal Procedure and the Federal Rules of Evidence now avoid characterizing the process by which courts take cognizance of what the law is as judicial notice, thereby emphasizing the non-evidentiary nature of the process. See Fed. R. Civ. P. 44.1; Fed. R. Crim. P. 26.1; Fed. R. Ev. 201; Notes of Advisory Committee to Fed. R. Civ. P. 44.1 (1966). These rules, as last amended in 1972, allow courts to determine even foreign law on the basis of any relevant material or source, whether or not submitted by a party and whether or not admissible under the Federal Rules of Evidence. Fed. R. Civ. P. 44.1; Fed. R. Crim. P. 26.1. Presumably, the drafters felt it unnecessary to include a similar statement with respect to domestic law.

Since the wiretap application in this case was considered by Judge Urbom prior to the effective date of the latest amendments to the above rules, we observe that prior caselaw holds that federal courts may judicially notice state law even though neither party raises it. *Petersen v. Chicago G.W. Ry.*, 3 F.R.D. 346 (D. Neb.), *affirmed*, 138 F.2d 304 (8th Cir. 1943). *See Simmons v. Continental Casualty Co.*, 410 F.2d 881, 884 (8th Cir. 1969). The *Petersen* holding accords with the result we reach here, and its substance remains intact following the developments noted in the preceeding paragraph.

Rule 41, Fed. R. Crim. P., does not require an affidavit to cite the statute purportedly violated.

III.

Defendants next contend that the Nebraska statute[11] upon which the federal conviction rests is unconstitutionally vague and overbroad. The vagueness argument falters for the reason that: "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy*, 417 U.S. 733, 756 (1974). *See United States v. Powell*, 423 U.S. 87, 92-94 (1975); *United States v. Mazurie*, 419 U.S. 544, 550 (1975); *Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973); *Big Eagle v. Andera*, 508 F.2d 1293, 1297 (8th Cir. 1975). As stated by the district court, "the evidence clearly supports, and the defendants admit to, a finding that they were engaged in bookmaking. This conduct is proscribed by the statute with sufficient clarity to satisfy constitutional scrutiny." Whatever else might be said about the statute, a vagueness argument will not, at least absent implication of the First Amendment, carry defendants beyond this initial observation.[12]

[11]R.R.S. Neb. §28-947 (1943) reads as follows: "Whoever keeps or exhibits any gaming table, establishment, device or apparatus, to win or gain money or other property of value, or aids, assists or permits others to do the same, or whoever engages in gambling for a livelihood, or shall be without any fixed residence, and in the habit or practice of gambling, shall be deemed and taken to be a common gambler, and shall be imprisoned in the county jail not less than one nor more than six months, and be fined in any sum not exceeding five hundred dollars."

[12]Defendants separately allege that the Nebraska statute punishes status rather than criminal activity. *Cf. Papachristou v. Jacksonville*, 405 U.S. 156 (1972). *Papachristou* rested on vagueness grounds and is accordingly subject to the standing requirement articulated in the text above. Since defendants' bookmaking activity was not mere status, it is immaterial in this case whether the statute might in some circumstances be read as punishing status or whether, if it may be so read, *Papachristou* would in such circumstances bar a conviction.

Defendants' overbreadth argument focuses upon the fact that, allegedly, the Nebraska statute might be read as encompassing such presumably innocent conduct as selling playing cards and reaching such presumably innocent persons as the itinerant purchaser of a lottery ticket. The Government admits that certain portions of the statute "may not be admirably as narrow and precise as possible", and we agree. Inasmuch as defendants do not contend that the Nebraska legislature either could not or did not intend to proscribe their bookmaking activities, however, the mere fact that the statute is in some respects imprecise is of no consequence here. The overbreadth doctrine, far from being an expansive license by which courts routinely invalidate statutes which might have been drafted with more precision, is a doctrine whose function is "limited . . . at the outset", *Broadrick v. Oklahoma, supra* at 615, and, specifically, a doctrine by which:

> Litigants . . . are permitted to challenge a statute [on its face] not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.

Id. at 612. *See Erznoznik v. Jacksonville*, 422 U.S. 205, 251-17 (1975); *Bigelow v. Virginia*, 421 U.S. 809, 815-17 (1975). Defendants do not suggest, and they would be hard-pressed to do so, that any of the conduct arguably reached by the statute is properly characterized as free expression. Failing that, they

cannot successfully invoke the overbreadth doctrine.[13]

Defendants also challenge the constitutionality and the district court's construction of 18 U.S.C. §1955. Specifically, they allege: (1) by resting the federal offense on state law, the statute is nonuniform in application and therefore violates the due process clause of the Fifth Amendment; (2) Congress did not intend to reach purely intrastate gambling activities; and (3) Congress did not intend to elevate a state misdemeanor into a federal felony.

The first two allegations just listed have been repeatedly rejected by this court. *Schneider v. United States*, 459 F.2d 540 (8th Cir.), *cert. denied*, 409 U.S. 877 (1972); *United States v. Meese*, 479 F.2d 41, 42-43 (8th Cir. 1973); *United States v. Wolk*, 466 F.2d 1143, 1146 n.2 (8th Cir. 1972). *Accord, United States v. Morrison*, 531 F.2d 1089, 1093 (1st Cir. 1976); *United States v. Hawes*, 529 F.2d 472, 477-78 (5th Cir. 1976). We adhere to our prior decisions.

We also reject defendants' contention that Congress did not intend to elevate a Nebraska misdemeanor into a federal felony. Although the underlying Nebraska statute in this case does not define a misdemeanor, defendants' characterization of §1955 as "elevating" that misdemeanor into a federal felony is not accurate.

[13]Appellants' brief summarily alleges that the Nebraska statute is unconstitutional because "it embraces different subject matter, the elements of which have no bearing or relation to one another." No authority is cited for this proposition, and no reasoning or analysis is presented. The Government informs us that this contention is intended to rest on Article III, Section 14 of the Nebraska Constitution, which proscribes bills containing more than one subject. We decline to address the merits of this contention. See Rule 28(a)(4), Fed. R. App. P.

It must be recalled that violation of state law is not the sole element of a §1955 offense. The Government must also establish that five or more persons are involved and that gambling business remains in substantially continuous operation for a period in excess of thirty days or that the business has gross revenues of $2,000 in any single day. As the Supreme Court has observed, "[m]ajor gambling activities were a principal focus of congressional concern." *Iannelli v. United States*, 420 U.S. 770, 787 (1975). The requirements of §1955 on their face effectuate this concern. More fundamentally, the Supreme Court has also observed that the Organized Crime Control Act of 1970, of which §1955 is a part, "is a carefully crafted piece of legislation." *Id.* at 789. It is thus significant that the statute makes no distinction whatsoever between state felonies and state misdemeanors. Similarly, the House Report which accompanied the 1970 Act[14] makes no such distinction. Defendants cite no convincing authority indicating that or why the statute should not be construed as written,[15] and we perceive no reason why it should not

[14]H.R. Rep. No. 91-1549 (1970), U.S. Code Cong. and Admin. News 4007, 4009-10, 4028-32 (1970).

[15]Defendants do cite *Rewis v. United States*, 401 U.S. 808 (1971), in which the Supreme Court reversed certain convictions under the Travel Act, 18 U.S.C. §1952, and the aiding and abetting statute, 18 U.S.C. §2. Section 1952 prohibits interstate travel with intent to "promote, manage, establish, carry on, or facilitate," *inter alia*, illegal gambling activity. In *Rewis* the Court held that operators of an illegal gambling business could not successfully be prosecuted under §§1952 and 2 merely because their customers crossed state lines to place bets. The following passage of *Rewis*, it is urged, supports defendants' contention that §1955 was not intended to apply to state misdemeanors.

> [W]e are struck by what Congress did not say [in §1952]. Given the ease with which citizens of our Nation are able

(continued)

(footnote continued from preceding page)

> to travel and the existence of many multi-state metropolitan areas, substantial amounts of criminal activity, traditionally subject to state regulation, are patronized by out-of-state customers. In such a context, Congress would certainly recognize that an expansive Travel Act would alter sensitive federal-state relations, could overextend limited federal police resources, and might well produce situations in which the geographic origin of customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies.

401 U.S. at 811-12.

Close examination of the *Rewis* opinion convinces us that *Rewis* supports our conclusion rather than defendants' contention. The Government's argument in *Rewis* was attenuated. The defendants there, who did manage an illegal intrastate lottery, did not travel interstate in conducting it. The latter fact precluded any literal application of §1952. The Government, recognizing as much, argued that the business' customers did travel interstate and that the operators were responsible for *that* travel. Apparently, the argument was based to some extent on the aiding and abetting statute, §2. In any event, the argument was dubious at best, since the Supreme Court was firmly of the view that the customers themselves did not violate §1952. It was in this context that the Court stated that, in light of the delicate federal-state and other concerns at issue, it would not attribute so expansive a view to the Travel Act absent a clear statement by Congress. Most importantly, the Court recognized that "[i]t is not for us to weigh the merits of these factors," 401 U.S. at 812, and it rested its holding squarely on the fact that "neither statutory language nor legislative history supports such a broad-ranging interpretation of §1952." *Id.*

We do not doubt that the important factors enumerated in the quoted passage from *Rewis* are highly pertinent to the congressional decisionmaking embodied in §1955. However, in stark contrast to the attenuated argument presented by the Government in *Rewis*, the Government's case here rests on a straightforward application of the plain language of §1955. Obviously cognizant that it was delving into areas of sensitive federal-state relationships, the Congress has said that conducting a gambling business illegal under state law is a federal felony if certain quantitative requirements are established. It is not for us to weigh the merits of that determination. In short, as the *Rewis* Court was struck by what Congress did not say in §1952, we are struck by what Congress did say in §1955.

be so construed. We accordingly reject defendants' contention.[16]

V.

Lastly, defendants contend that the evidence was insufficient to sustain their convictions. They contend that, except as to defendant Clarence J. Mayta, there is no evidence to establish that they were systematically and continuously involved in the gambling business. A claim also is apparently made that the requirements of the statute that five or more persons be involved and that the gambling has been in operation for thirty or more days or that the gross income has exceeded $2,000 on a single day have not been met.

The record in this case includes 3,802 pages of transcript as well as numerous exhibits including tapes of intercepted calls. Defendants' brief on this point consumes slightly more than one page and consists entirely of unsupported conclusions.

The trial court, which had the benefit of hearing all the evidence, in an order filed October 8, 1974, denying motions of all defendants for judgments of acquittal, found and determined:

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[16]The Ninth Circuit has rejected as without merit any contention that Congress could not constitutionally define a federal felony partially in terms of a state misdemeanor. In *United States v. Kerrigan*, 514 F.2d 35, 37 n.1 (9th Cir. 1975), in reference to §1955, that court stated:

> Congress' power to proscribe conduct carries with it the power to impose appropriate penalties without attempting to match them to varying state punishments for similar conduct.

We agree.

Having the evidence of this case fresh in the mind of the Court and after a review of all the notes taken in this four week trial, the Court finds that there was an abundance of evidence, more than sufficient, as to each defendant which demanded that this case be submitted to the jury to consider the guilt or innocence of each defendant under Count I.

* * *

The evidence admitted in this case was of such sufficiency that the jury would be allowed to find that a gambling business existed in the State of Nebraska at some time between October 15, 1970, and February 12, 1972. The evidence was also competent and sufficient to allow the jury to find that such business, involving five or more persons, was illegal under the laws of the State of Nebraska, and that each of these defendants conducted, financed, managed, supervised, directed or owned all or part of such business. There was also a competent and sufficient amount of evidence from which the jury could find that such gambling business was in substantially continuous operation for a period in excess of thirty (30) days or that such gambling business had a gross revenue of $2,000 or more in any single day between the dates of October 15, 1970, and February 12, 1972. The evidence was competent and sufficient at the close of the Government's case as to each defendant on each essential element that such evidence necessitated and compelled the submission of this case to the jury.

A detailed review of the evidence supporting the trial court's determination would unduly prolong this opinion and serve little useful purpose. We have carefully examined the pertinent portions of the record. Under the well-established principles for review of jury verdicts, we are in complete agreement with the trial

court's determination that there is substantial evidence to support the guilty verdict as to each defendant.

Defendants have neither urged nor demonstrated that the trial court's determination on the sufficiency of the evidence was induced by any misinterpretation of the applicable law.

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.